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Supreme Court of the United States

October Term, 1964
No. 369

IRVING A. KANARECK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims.

PETITIONER'S REPLY BRIEF.

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Supreme Court of the United States

October Term, 1964
No. 280

IRVING A. KANAREK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Claims.

PETITIONER'S REPLY BRIEF.

Scrutiny of Respondent's Brief in Opposition (hereinafter referred to as "Brief Opp.") fortifies the Petition for the Writ of Certiorari:

I.

Respondent Concedes That the Secret Clearance Was Not Re-Granted Until February 7, 1958.

Respondent concedes (Brief Opp. 4) that secret clearance was regranted on February 7, 1958. Petitioner has shown this in his Petition (Pet. 10) and before the United States Court of Claims. In the decision and judgment of the Court of Claims (see Appendix "A" at the bottom of p. 2 of Appendices in Petition) that Court incorrectly finds and holds that on September 21, 1955, access to classified security information was

restored; said Court of Claims has refused to consider Petitioner's claim beyond said September 21, 1955. Respondent states (Brief Opp. 4) that on September 21, 1955, Petitioner received notice of his eligibility for a secret clearance. Such simply was not the case. On September 16, 1955, Petitioner was merely sent notice [Ex. 23] that his access to classified information was "clearly consistent with the interests of national security." There was no statement made as to the degree of classification for which he was eligible: confidential, secret, or top secret. Despite the fact that respondent found on or about September 16, 1955 that the granting of access to classified information to Petitioner was "clearly consistent with the interests of national security", Petitioner was not able to obtain employment until April 9, 1956, (at Lockheed Aircraft Corporation); and even after obtraining employment at said Lockheed Aircraft Corporation, respondent did not allow Petitioner access to classified information at the secret level, necessarily handicapping Petitioner in his professional work at Lockheed. On the date of severance from Lockheed on January 21, 1957, the United States still, despite the lip service given on September 16, 1955, that the granting of access of Petitioner to classified material was "clearly consistent with the interests of national security," had not granted Petitioner secret clearance, let alone the top secret clearance which he had had at North American Aviation. In any event, *Taylor v. McElroy*, 360 U. S. 709, (Brief Opp. 7), clearly holds that the compensation for wages lost must be the

> "wages lost during the time he (referring to Mr. Taylor at p. 711) was unemployed due to clearance revocation."

Thus on this point alone the Court below, in allowing no monetary recovery beyond September 21, 1955, has clearly not followed the holding of this Court in the *Taylor* case since petitioner did not regain employment until April 9, 1956, and did not regain secret clearance until February 7, 1958.

II.

Petitioner's Claim Below Extended Beyond September 21, 1955.

The statement by respondent (Brief Opp. top of p. 8) that Petitioner has made no administrative claim for losses beyond September 21, 1955 is simply not the case. This is evident by referring to the Certified Record [R. 133-139] "Defendant's Supplemental Brief and Exhibits Following Administrative Action." The Exhibits attached to and described in said Supplemental Brief plainly show Petitioner's claim for at least $163,831 [See Exs. 25, 27, 29, 30, 32, and 33].

III.

The Petition Requests That This Court Consider All of the Grounds Under 28 U. S. C 1491.

Respondent erroneously states (Brief Opp. footnote at p. 9) that Petitioner does not contest the rejection by the Court of Claims of Petitioner's claim under the two portions of 28 U. S. C. 1491 referred to in footnote 7 (Brief Opp. p. 9). At page 11 of the Petition it may be clearly seen that Petitioner is basing his Petition on all of the clauses of 28 U. S. C. 1491 (See App. "B", p. 9 of Appendices of the Petition wherein there is set forth the portion of 28 U. S. C. 1491 pertinent in the instant case). See the Certified Record [R. 1160 and R. 95-122] wherein there is set forth in great detail the basis for recovery under each of the

portions of 28 U. S. C. 1491; for instance, the basis that the claim is one for liquidated or unliquidated damages in a case not sounding in tort is analyzed in Section IV [beginning at R. 104] of "Plaintiff's Response Brief to Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" [which begins at R. 95].

Analysis of Sections 106, 107 of Prosser, Law of Torts (2d Ed. 1955) leaves no doubt whatsoever that a very essential element of the tort of interference with contractual relations is that said interference be INTENTIONAL, if not actually malicious or based on fraud. The relationship between the Plaintiff and North American Aviation, Inc. on the date that security clearance was withdrawn, July 12, 1954, was that of an employment contract terminable at the will of either party. In the interference of such contracts, Prosser indicates, California finds no tort even when the third party does act willfully, maliciously and fraudulently and with intent to damage the Plaintiff. *G. E. Harris v. Edward Hirschfeld et al.*, 13 Cal. App. 2d 204 at 205. The *Harris* case is cited in Section 106 at page 720, note 52 of Prosser. In the *Harris* case the Court had before it a contract at will in the form of a partnership. In *Gruen Watch Company v. Artist Alliance, Inc. et al*, 191 F. 2d 700, the Court of Appeals for the Ninth Circuit, which includes California, in construing California law, decided that whether a contract is at the will of the parties or not, a tort does arise in a situation in which the actor conducts himself in a manner wherein he DELIBERATELY interferes with the contractual relations between the plaintiff and a third party. In the *Gruen* case the acts

giving rise to the tort were designed with the specific intent of interfering with the plaintiff's contractual relations with the third party. In *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33 at 39 the California Supreme Court states

> "In California, therefore, an action will lie for unjustifiably INDUCING a breach of contract." (Emphasis added.)

The Court in *Imperial Ice* stated, *inter alia*, for a tort action to lie in California the act of inducing the breach must have been done with the specific purpose in mind of bringing about said breach. Surely the respondent does not contend that security clearance was withdrawn for the specific purpose of interfering with the instant Petitioner's employment. Supposely, said withdrawal was to protect security. In fact, in Item 3c of Program A, at page 2 of the Industrial Personnel and Facility Security Clearance Program and Item 3b of Program B, at page 2 of the Industrial Personnel Security Review Regulation it is set-forth that the purposes of Program A and Program B do not encompass the intent of precluding one whose security clearance is withdrawn from participating in unclassified work for the same employer for whom he worked while having security clearance.

Applying, then, 28 U. S. C. 1346 (b) to the instant case no tort of interference with contractual relations occurred. Such must be the conclusion since 28 U. S. C. 1346 (b) very clearly states that the law to be applied is "the law of the place where the act or omission occurred." Since the withdrawal of security clearance occurred in California, there was no tort, as aforesaid. This Court is referred to the analysis of interference

with contract relationships in 28 Cal. Jur. 2d 423 *et seq.* Just a few of the cases in point are *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, *Imperial Ice Company v. Rossier*, 18 Cal. 2d 33, cited *supra*, and *Patterson Glass Company v. Thomas*, 41 Cal. App. 559. Pervading all California case law on the subject is the requirement that there be SPECIFIC INTENT TO INDUCE THE BREACH BETWEEN THE PLAINTIFF AND THE THIRD PARTY ON THE PART OF THE ACTOR. Certainly, as aforesaid, the respondent does not impute such motivation to its representatives in the instant case.

In Section 107 of Prosser, alluded to previously, Professor Prosser shows clearly that in interference with prospective advantage, as he terms it, there is the requirement of a greater degree of intent on the part of a defendant before such interference becomes a tort than in the situation involving an existing contract. A fortiori, stronger specific intent is necessary for a tort to exist in the prospective advantage or prospective contract situation since in the "prospective" cases there is no privity on the part of the plaintiff and a third party or third parties contemporaneous with the actor's wrongful acts. Cases in point are *Masoni v. Board of Trade*, 119 Cal. App. 2d 738 and *Krigbaum v. Sharbaro*, 23 Cal. App. 427 cited at 28 Cal. Jur. 2d 427. Here, again, California law is applicable, and thus, if the actor had been a private person committing these acts in California, said acts would not have resulted in a tort. Thus, the acts here do not fall within the scope of 28 U. S. C. 1346 (b).

Hence, the acts of the defendant constitute a case "not sounding in tort" and not within the Federal Tort

Claims Act. That such is the case is fortified by 28 U. S. C. 2680 (h) which does not even encompass interference with prospective economic advantages within its scope. See *Builders Corporation of America v. United States*, 259 F. 2d 766 at 769. Plaintiff's claim is one "not sounding in tort" and within the jurisdiction of the Court of Claims.

IV.

There Is No Administrative Remedy.

Petitioner contends there was, in fact, no administrative remedy (Pet. 9; [R. 118-122] to exhaust. A procedure whereby, as in the instant case, the so-called "administrative remedy" consisted of correspondence between a citizen and the Federal Government in which there is no set individual or office of the Federal Government delegated with specific authority to administer the claim involved, but rather, there is an unorganized, unprescribed passing of a file from one office to another, and from one person to another, with no prescribed time for resolution of a claim, or even a time prescribed when the alleged administrative remedy reaches its conclusion, hardly constitutes a procedure which may be given the dignity of being termed an "administrative remedy." Furthermore, the personnel purportedly administering the claim in the instant case are personnel of the same department which promulgated the regulation which this Court found to be unauthorized; it is respectfully suggested that the alacrity and objectivity with which this claim has been administered was diluted down, to say the least, by the resentment of the fact that this Court found Programs "A" and "B" unauthorized.

V.

Purported Monetary Restitution Provisions Are Unauthorized.

Respondent states (Brief Opp. 7) that the reimbursement provisions of the Department of Defense Directive 5220.6 were not affected by *Greene v. McElroy*, 360 U. S. 474. Petitioner contends that said reimbursement provisions are, in fact, unauthorized (Pet. 2). In *Greene v. United States*, 376 U. S. 149, the parties did not raise or dispute the specific question of whether or not the monetary restitution provisions were authorized; nor was it raised or disputed in *Greene v. McElroy, supra*, or in *Taylor v. McElroy*, 360 U. S. 709 where the ultimate relief sought was security clearance not money damages. Petitioner contends that what was termed Program "A" and Program "B" in the Petition were unauthorized. Such must be the conclusion since the Federal Constitution delegates certain powers to the executive branch none of which gives to any office of said executive branch the power to legislate law applicable to claims arising from the unauthorized withdrawal of security clearance of an employee of a contractor of the Federal Government.

In what Petitioner contends is a vain attempt to find authority for the monetary restitution provisions (Brief Opp. 7, footnote 6), respondent cites Federal law which applies to Government employees, tacitly admitting that there is no authority to determine the provisions for setting monetary damages in the case of Petitioner, an employee of a contractor of the Federal Government. In this connection, it is extremely important to note that the Federal statutes and cases cited in the aforementioned footnote 6 (Brief Opp. bottom p. 7 and

bottom p. 8) clearly apply only to employees of the Federal Government (see 5 U. S. C. 22-1 and 5 U. S. C. 652). In Cooley's "A Treatise on the Constitutional Limitations" (Eighth Edition, 1927) it is stated at p. 224 as follows:

> "One of the settled maxims in constitutional law is, that the power conveyed upon the legislature to make laws cannot be delegated by that department to any other body or authority".

Furthermore, in *Field v. Clark*, 143 U. S. 649, this Court held at p. 692

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and the maintenance of the system of government ordained by the Constitution."

In the instant case the purported monetary damage provisions are invalid, *a fortiori*, since not only is there no delegation to the President or any executive department by Congress for the formulation of regulations for the expenditure of Federal funds for monetary damages to a contractor-employee due to the unauthorized withdrawal of security clearance, but the President himself made no order authorizing any Federal agency to formulate purported monetary restitution provisions which respondent is attempting to apply here. Rather someone arbitrarily "borrowed" a statute (Brief Opp. 9, footnote 6). The danger in allowing legislative power to repose in those to whom such power has not been delegated by the Constitution is evident in Defendant's Exhibit 9 in the Certified Record (attached to Defendant's Reply to Plaintiff's Objections to Defendant's

Motion to Dismiss which begins at R. 63). In said exhibit, a letter of July 18, 1950, Respondent stated that the monetary restitution requested by Petitioner was GRATUITOUS, clearly showing that the state of mind of the agency of the Federal Government involved was that the claim was being processed at its whim and caprice and not as a claim justified in law. The statement is as follows [see last two sentences of the second paragraph of said Ex. 9]:

> "Please be further advised that there is no statute or law which creates liability for such repayment on the part of the United States. Claims of your type are considered GRATUITOUS payments under the regulations set within the Department of Defense" (Emphasis added).

This approach to the administration of a claim involving Federal funds hardly represents the judicial approach demanded by this Court in the administration of justice at any level in the administrative or judicial process.

VI.

Petitioner's Claim Has Adequate Bases Founded on the Due Process and Just Compensation Clauses of the Fifth Amendment.

Plaintiff's Objections to Defendant's Motion to Dismiss before the Court of Claims [beginning at R. 11] sets forth due process and just compensation bases for Petitioner's claim [See Sec. V of said Objections beginning at R. 19, Sec. VII of said Objections beginning at R. 25 and Sec. VIII of said Objections beginning at R. 32]. Respondent's reliance upon the *Omnia Co.*, *Grand River Dam* and *Central Eureka Mining* cases (Brief Opp. 8) is misplaced since in each of those cases

there was a lawful exercise of delegated power by the Federal Government. In the instant case, of course, since the withdrawal of security clearance was not authorized, there was no lawful exercise of a delegated power by the Federal Government. Respondent states (Brief Opp. bottom of p. 8) that the issue of whether or not the revocation of Petitioner's security clearance constitutes a deprivation of property without due process of law has not been resolved in Petitioner's favor, notwithstanding the fact that in the *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886 at 898, this Court very strongly indicates that bestowing a "badge of disloyalty and infamy" constitutes such deprivation.

Respondent's contention (Brief Opp. p. 9) that no suit for damages lies against the United States as a consequence of unauthorized administrative action has a crumbling foundation. See *Larson v. Domestic and Foreign Corp.*, 337 U. S. 682. At the bottom of p. 703 and top of p. 704 in *Larson* this Court states that it should "give hospital scope" to suits for damages, stating that there "may be substance" in connection with such suits for the viewpoint that the

> "principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible."

Furthermore, in the instant case under 28 U. S. C. 1491 Congress has provided for suits founded upon the Constitution which is one of the bases for the claim for damages in the instant case (see, *infra*).

Justice Clark in his dissent in *Greene v. McElroy, supra*, at 513 points out that the decision of the Court in *Greene*

"may have the effect of by-passing"

the Tort Claims Act exemption of the Government from suit for interference with private contracts. Justice Clark states on page 512 that the Court held that *Greene* is protected by the Fifth Amendment. He makes the same statement on page 513.

In *Compagnie General Transatlantique v. The United States*, 21 Fed. 2d 465, Judge Augustus Hand states at p. 466, referring to the Tucker Act, which is now essentially 28 U. S. C. 1491:

> "To limit the recovery in cases 'founded' upon a law of Congress to cases where the law provides in terms for a recovery would make that provision of the Tucker Act almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. 'Founded' must therefore mean reasonably involving the application of a law of Congress."

By the same token one or more of the four segments or clauses of 28 U. S. C. 1491 may be "reasonably" involved in a particular case. Unquestionably in this case the Constitution by way of the due process and just compensation clauses of the Fifth Amendment is "reasonably" involved.

Significantly, respondent does not dispute the fundamental conflict, pointed out at the bottom of page 14

of the Petition, which exists between the decisions of the Court of Appeals for the Ninth Circuit and the Court of Claims.

Conclusion.

Petitioner asks this Court of last resort to grant a plenary review so that correct evaluation and assessment of the past and continuing damage sustained by Petitioner (to date the damage has extended for over a ten year period) may take place. For the reasons set-forth herein, and in the Petition for a Writ of Certiorari, said Petition should be granted.

Respectfully submitted,

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